



Tel: 617-788-6550

Fax: 617-788-8965

**THE COMMONWEALTH OF MASSACHUSETTS
ADMINISTRATIVE OFFICE OF THE JUVENILE COURT**

Three Center Plaza
Boston, Massachusetts 02108

MARTHA P. GRACE
Chief Justice

April 28, 2006

**Proposed Juvenile Court Rules
for Violation of Probation Proceedings**

The Juvenile Court is inviting comments on the proposed Juvenile Court Rules for Violation of Probation Proceedings.

Before submission to the Chief Justice for Administration and Management and the Supreme Judicial Court for approval, you are invited to offer any suggestions or comments you may wish to provide.

The text of the proposed Juvenile Court Rules follows this message. Comments may be sent by email to: juvenilecourtrules@jud.state.ma.us or mailed to: Juvenile Court Rules, Attention: Attorney Anne Marie Ritchie, Administrative Office of the Juvenile Court, 3 Center Plaza, Boston, MA 02108, whichever is more convenient. Written comments should be received by May 19, 2006.

April 18, 2006

COMMONWEALTH OF MASSACHUSETTS

JUVENILE COURT DEPARTMENT

Rules for Probation Violation Proceedings

RULE 1. SCOPE AND PURPOSE

These rules prescribe procedures in the Juvenile Court to be followed upon the allegation of a violation of an order of probation issued in a delinquency, youthful offender or criminal case after a finding of delinquency, youthful offender or guilty, or after a continuance without a finding. These rules do not apply to an alleged violation of pretrial probation, as the latter term is defined herein.

The purpose of these rules is to ensure that judicial proceedings undertaken upon the allegation of a violation of probation are conducted in full compliance with all applicable law, promptly and with an appropriate degree of procedural uniformity.

RULE 2. DEFINITION OF TERMS

In construing these rules, the following terms shall have the following meanings:

"Continuance without a finding" means the order of a court, following a formal submission and acceptance of a plea of guilty or an admission to sufficient facts in a criminal case or youthful offender case; or, in a delinquency case, following a formal submission and acceptance of a plea of delinquency or an admission to sufficient facts or after a trial in which the allegations are proven beyond a reasonable doubt, whereby the case is continued to a date certain without the formal entry of a guilty, youthful offender or delinquency finding. A continuance without a finding may include conditions imposed in an order of probation (1) the violation of which may result in the revocation of the continuance, entry of a finding of guilty, youthful offender or delinquency and imposition of sentence or commitment to the Department of Youth Services and (2) compliance with which will result in dismissal of the case.

"District Attorney" means the criminal prosecuting authority including the Attorney General if the criminal case in which probation was ordered was prosecuted by the Office of the Attorney General.

"General conditions of probation" means the conditions of probation that are imposed as a matter of course in every order of probation, as set forth in the official form promulgated for such orders.

April 18, 2006

"Probation order" means the formal, written court order whereby a defendant is placed on probation and which expressly sets forth the conditions of probation.

"Pretrial probation" means the probationary status of a defendant pursuant to a probation order issued prior to a trial or the formal submission and acceptance of a plea of delinquent, youthful offender or guilty, or an admission to sufficient facts.

"Revocation of probation" means the revocation by a judge of an order of probation as a consequence of a determination that a condition of that probation order has been violated.

"Special conditions of probation" means any condition of probation other than one of the general conditions of probation.

"Surrender" means the procedure by which a probation officer requires a probationer to appear before the court for a judicial hearing regarding an allegation of probation violation.

RULE 3. COMMENCEMENT OF VIOLATION PROCEEDINGS: CHARGED CRIMINAL OR DELINQUENT CONDUCT

(a) General. This rule prescribes the procedures to be undertaken upon the issuance of a criminal or delinquency complaint or youthful offender indictment against a probationer.

(b) Where Probation Order and Criminal or Delinquency Charge Involve Same Division

(i) Issuance and Service of Notice. When a criminal or delinquency complaint is issued by a division or a youthful offender indictment is returned by a grand jury against a defendant who is the subject of a probation order previously issued by that same division, the Probation Department shall commence violation proceedings against that probationer. Such proceedings shall be commenced by the issuance by the Probation Department of a Notice of Probation Violation/Hearing at or before the arraignment on the criminal or delinquency charge. The Notice shall be served on the probationer in hand at arraignment and such service shall be recorded on the case docket, provided that if such in-hand service is not possible, the Notice shall be served on the probationer by first-class mail, unless the court orders otherwise. Service of the Notice by first-class mail shall be recorded on the case docket. Out-of-court service other than by mail shall require a written return of service. A copy of each Notice of Probation Violation/Hearing shall be provided to the District Attorney forthwith upon its issuance.

The court, upon review of the Notice at arraignment and as a matter of its discretion, may order no further proceedings in the matter, and in such cases formal service of the Notice on the probationer shall not be required.

April 18, 2006

(ii) Contents of Notice. The Notice of Probation Violation/Hearing shall set forth the criminal or delinquency behavior alleged to have been committed by the probationer as indicated in the criminal or delinquency complaint, and shall set forth any other specific conditions of the probation order that the Probation Department alleges have been violated with a description of each such alleged violation.

(iii) Scheduling of Hearing. The probation violation hearing shall be scheduled to be conducted on the date of the pretrial hearing for the criminal or delinquency charge, unless the court expressly orders an earlier hearing. The hearing shall be scheduled for a date certain no less than seven days after service on the probationer of the Notice of Violation/Hearing unless the probationer waives said seven-day notice period. The hearing date shall not be later than fifteen days after service of the Notice of Violation/Hearing without the probationer's consent if he or she is held pursuant to Rule 8 of these rules, or in any case no later than thirty days after service of the Notice of Violation/Hearing if the probationer objects, except in extraordinary circumstances. In scheduling the pretrial hearing on the new criminal, youthful offender or delinquency charge together with the probation violation hearing, the court shall give primary consideration to the need for promptness in conducting the probation violation hearing.

(c) Where Probation Order and Criminal or Delinquency Charge Involve Different Divisions.

(i) Issuance and Service of Notice. When a criminal or delinquency complaint is issued by a division of the Juvenile Court Department against a defendant who is the subject of a probation order issued by a different division of the Juvenile Court Department, the Probation Department in the division that issued the criminal or delinquency complaint shall issue a Notice of Probation Violation/Hearing to the probationer at or before arraignment on the criminal or delinquency charge. The Notice, as provided in section (c)(ii), below, shall be served on the probationer in hand at arraignment and such service shall be recorded on the case docket. The Probation Department forthwith shall send a copy of said Notice, indicating such in-hand service, to the Probation Department of the division that issued the probation order, together with a copy of the complaint and police report on the criminal or delinquency offense that constitutes the alleged probation violation. Nothing in this rule shall preclude the issuance and service on the probationer of a Notice of Probation Violation/Hearing by the Probation Department of the division that issued the probation order. If in-hand service is not possible, the notice shall be served on the probationer by first-class mail unless the court orders otherwise.

(ii) Contents of Notice. The Notice of Probation Violation/Hearing issued to and served on the probationer at the division that issued the criminal or delinquency complaint shall set forth the criminal or delinquent behavior alleged to have been committed by the probationer as indicated in the criminal complaint and shall order the probationer to appear at a specific date and time at the division that issued the probation order.

April 18, 2006

(iii) Scheduling of Hearing; Service by Probation Division. Upon appearance of the probationer at the division that issued the probation order in accordance with the Notice served pursuant to subsection (ii), the court shall appoint counsel, if necessary, and schedule a probation violation hearing for a date certain, said date to be no less than seven days later unless the probationer waives said seven-day period. The hearing date shall not be later than fifteen days after service of the Notice of Violation/Hearing without the probationer's consent if he or she is held pursuant to Rule 8 of these rules, or in any case no later than thirty days after service of the Notice of Violation/Hearing if the probationer objects, except in extraordinary circumstances. The Probation Department may revise the Notice of Probation Violation/Hearing by adding to it any additional alleged violations. Such additional allegations shall set forth the specific conditions of the probation order alleged to have been violated with a description of each such alleged violation. The Notice with amendments, shall be served on the probationer in hand while he or she is before the court. Such service shall be recorded on the case docket. A copy of the Notice, with any amendments, shall be provided to the District Attorney. The probationer shall receive either written or actual notice of the date, time and place of the hearing.

The court, upon review of the Notice at the outset of the hearing and as a matter of its discretion, may order no further proceedings in the matter, and in such cases no hearing shall be scheduled nor further Notice served.

RULE 4. COMMENCEMENT OF VIOLATION PROCEEDINGS: VIOLATIONS OTHER THAN CHARGED CRIMINAL, YOUTHFUL OFFENDER OR DELINQUENT CONDUCT

(a) General. This rule prescribes the procedures to be undertaken regarding alleged violations of probation that do not involve or include criminal, youthful offender or delinquent conduct charged in a criminal, youthful offender or delinquency complaint or indictment.

(b) Issuance and Service of Notice. When a probation officer of a division that has issued a probation order determines that a probationer has violated any condition of that order other than the alleged commission of a crime as charged in a criminal or delinquency complaint or youthful offender indictment, that probation officer shall decide whether to commence probation violation proceedings. Such decision shall be made in accordance with the rules and regulations of the Office of the Commissioner of Probation, provided, however, that probation violation proceedings shall be commenced (1) upon the issuance of a criminal complaint or indictment, (2) when the judge issuing the probation order orders that such proceedings are to be commenced upon an alleged violation of one or more conditions of probation, or (3) when the commencement of such proceedings is required by statutory mandate. In any case, a judge of the division may order the commencement of violation proceedings.

April 18, 2006

The Notice of Probation Violation/Hearing as provided in section (c), below, shall be served on the probationer in hand or by first-class mail, unless the court orders otherwise. Service of the Notice in hand or by first-class mail shall be recorded on the case docket. Out-of-court service other than by first-class mail shall require a written return of service. A copy of each Notice of Probation Violation/Hearing shall be provided to the District Attorney forthwith upon its issuance.

(c) Contents of Notice. The Notice of Probation Violation/Hearing shall set forth the conditions of the probation order that the Probation Department alleges have been violated and shall order the probationer to appear at a specific date and time.

(d) Scheduling of Hearing. Upon appearance of the probationer in accordance with the Notice required by section (c), the court shall appoint counsel, if necessary, and schedule a probation violation hearing for a date certain, said date to be no less than seven days later unless the probationer waives said seven-day notice period. The hearing date shall not be later than fifteen days after said appearance without the probationer's consent if he or she is held pursuant to Rule 8 of these rules, or in any case no later than thirty days after said appearance if the probationer objects, except in extraordinary circumstances.

RULE 5. CONDUCT OF HEARINGS

(a) In General. Probation violation hearings shall be conducted by a judge, on the record, with such flexibility and informality as the court may deem appropriate, consistent with the requirements of this rule and applicable law. All testimony shall be taken under oath. The presentation of the case against the probationer shall be the responsibility of the probation officer assigned by the Chief Probation Officer of the court. The probationer shall be entitled to the assistance of counsel, including the appointment of counsel for probationers determined by the court to be indigent.

(b) Requirement of Two-Step Procedure. Probation violation hearings shall proceed in two distinct steps, the first to adjudicate the factual issue of whether the alleged violation or violations occurred, the second to determine the disposition of the matter, if a violation of probation is found by the court to have occurred.

(c) Adjudication of Alleged Violation. Probation violation hearings shall commence with a statement by the probation officer describing the violation or violations alleged in the Notice of Violation and Hearing, and shall proceed with a presentation of the evidence supporting said allegations. The probationer shall be permitted to present evidence relevant to the issue of the alleged violation. Each party shall be permitted to cross-examine witnesses produced by the opposing party. Hearsay evidence shall be admitted by the court in accordance with Rule 6, provided that the court shall enforce any statutory privileges unless waived and any legally required disqualifications. The probation officer shall have the burden of proving the alleged

April 18, 2006

violations with or without the participation of the District Attorney as provided below. The standard of proof at such hearings shall be the civil standard of preponderance of the evidence. After the presentation of evidence, both the probation officer and the probationer shall be permitted to make a closing statement.

(d) Dispositional Decision. If the court finds that the probationer has violated one or more conditions of probation as alleged, the probation officer shall recommend to the court a disposition consistent with the dispositional options set forth in Rule 7(d), below, and may present argument and evidence in support of that recommendation. The probationer shall be permitted to present argument and evidence relevant to disposition and to propose dispositional terms.

(e) Continuances. Probation violation hearings shall be continued only by a judge and for good cause shown. The reason for any continuance shall be stated by the judge and recorded on the case docket. No continuance shall be ordered other than to a date certain and for a specific purpose, and as provided in Rule 7(a). The pendency of a criminal, delinquency or youthful offender action on a charge which also constitutes an alleged violation of probation shall not be grounds for a continuance of the probation violation hearing unless a judge determines the interests of justice will be served by such a continuance.

(f) Participation of the District Attorney.

(i) In General. The District Attorney may participate in probation violation hearings as provided in G.L. c. 279, s. 3, and such participation shall be permitted in any such proceeding regardless of whether the criminal, delinquency or youthful offender case in which the probation order was issued involved a felony charge.

(ii) Coordination with the Probation Department. If the District Attorney intends to appear at a probation violation hearing, he or she shall confer prior to the hearing with the probation officer responsible for presenting the matter to the court, for the purpose of coordinating the District Attorney's involvement in the hearing with the planned presentation of the probation officer.

(iii) Presentation of Evidence. The District Attorney may present and examine witnesses at the hearing and may examine witnesses presented by the probation officer, and may cross-examine witnesses presented by the probationer. The probationer may cross-examine witnesses presented by the District Attorney. The District Attorney shall be responsible for the attendance of every witness he or she wishes to present, and for the summoning of such witnesses.

(iv) Finding and Disposition. After the presentation of evidence, the District Attorney may make a statement regarding the factual issue of whether one or more violations of probation has occurred. If the court finds that the probationer has violated one or more of the conditions of

April 18, 2006

probation as alleged in the Notice of Violation and Hearing, the District Attorney may be heard regarding the court's disposition of the matter. The District Attorney may present his or her dispositional recommendations orally or in writing.

RULE 6. HEARSAY EVIDENCE

(a) Admissibility of Hearsay Evidence. Hearsay evidence shall be admissible at probation violation hearings.

(b) Sufficiency of Evidence When Case Rests Solely on Hearsay. Where the sole evidence submitted to prove a violation of probation is hearsay, that evidence shall be sufficient only if the court finds in writing (1) that such evidence is substantially trustworthy and demonstrably reliable and (2), if the alleged violation is charged or uncharged criminal behavior, that the probation officer has good cause for proceeding without a witness with personal knowledge of the evidence presented.

RULE 7. FINDING AND DISPOSITION

(a) Requirement of Finding. Upon the completion of the presentation of evidence and closing arguments on the issue of whether the probationer has violated one or more conditions of a probation order, as alleged, the court shall make a determination of that issue. The court shall decide the matter promptly and shall not continue the proceeding generally.

(b) Finding of No Violation. If the court determines that the probation officer has failed to prove by a preponderance of the evidence that the probationer committed a violation alleged in the Notice of Probation Violation and Hearing, the court shall expressly so find and said finding shall be recorded on the case docket.

(c) Finding of Violation; Written Findings of Fact. If the court determines that the probation officer has proved by a preponderance of the evidence that the probationer has violated one or more conditions of probation as alleged in the Notice of Probation Violation and Hearing, or if the probationer admits or stipulates to such violation, the court shall expressly so find, and said finding shall be recorded on the case docket. The court shall make written findings of fact to support the finding of a violation, stating the evidence relied upon.

(d) Disposition After Finding of Violation. After the court has entered a finding that a violation of probation has occurred, the court may order any of the following dispositions set forth below, as it deems appropriate. These dispositional alternatives shall be the exclusive options available to the court. In determining its disposition, the court shall give appropriate weight to the recommendation of the Probation Department and such factors as public safety; the

April 18, 2006

seriousness of any offense of which the probationer was convicted or adjudicated; the nature of the probation violation; the occurrence of any previous violations and the impact on any victim of the underlying offense, as well as any mitigating factors.

(i) Continuation of Probation. The court may decline to modify or revoke probation and, instead, issue to the probationer such admonition or instruction as it may deem appropriate.

(ii) Termination. The court may order that the probation be considered completed and terminate the probation order.

(iii) Modification. The court may modify the conditions of probation. Such modification may include the addition of reasonable conditions and the extension of the duration of the probation order.

(iv) Revocation; Statement of Reasons. The court may order that the order of probation be revoked. If the court orders revocation, it shall state the reasons therefor in writing.

(e) Execution of Suspended Sentence or Commitment; Stay of Execution. Upon revocation of a probation order, any sentence or commitment to the Department of Youth Services that was imposed for the offense involved, the execution of which was suspended, shall be ordered executed forthwith; provided, however, that such execution may be stayed (1) pending appeal in accordance with Mass.R.Crim.P. 31, or (2) at the court's discretion, and upon the probationer's motion, to provide a brief period of time for the probationer to attend to personal matters prior to commencement of a sentence of incarceration or commitment to the Department of Youth Services. The execution of such sentence or commitment shall not be otherwise stayed.

(f) Imposition of Sentence or Commitment Where No Sentence or Commitment to the Department of Youth Services Previously Imposed. Upon revocation of probation in a case where no sentence or commitment was imposed following conviction or adjudication, the court shall impose a sentence or commitment as provided by law.

RULE 8. PRELIMINARY VIOLATION HEARINGS

(a) Purpose. A preliminary probation violation hearing shall be conducted when the Probation Department seeks to hold a probationer in custody or request an order of release on the basis of an alleged violation of probation pending the conduct of a full probation violation hearing. The issues to be determined at a preliminary probation violation hearing are whether probable cause exists to believe that the probationer has violated a condition of the probation order, and, if so, whether the probationer should be held in custody, or whether an order of release pending a final probation violation hearing is appropriate.

(b) Notice of Hearing. When a probationer is before the court having been arrested on a new criminal or delinquency charge, having been arrested for a probation violation, or for any other reason, and the Probation Department seeks to hold the probationer in custody or request an order of release, he or she shall be given notice of the alleged probation violation and advised that a determine whether there is probable cause to believe that he or she has committed that violation.

(c) Conduct of Hearing. Preliminary probation violation hearings shall be conducted by a judge or, if a judge is not available, a clerk-magistrate, in a courtroom on the record. The probationer shall be entitled to counsel. After the probationer has been advised of the alleged probation violation; that a preliminary probation violation hearing will be conducted as provided in section (b), above; and counsel has been appointed, if necessary; the probationer shall be allowed a reasonable time to prepare for the hearing. At the hearing, the probation officer shall present evidence to support a finding of probable cause. The District Attorney may assist in the presentation of such evidence. The probationer shall be entitled to be heard in opposition. Testimony shall be taken under oath. The court shall admit such evidence as it deems relevant and appropriate. The proceeding shall be limited to the issue of probable cause to believe that the alleged violation of probation has occurred.

If probable cause is found, a final probation violation hearing shall be scheduled, the probationer shall be served in hand a Notice of said hearing, and the court may order the probationer to be held in custody pending the conduct and completion of the scheduled final violation hearing. The court's decision whether to release the probationer or issue an order of release pending the conduct and completion of the final probation violation hearing, notwithstanding a finding of probable cause on an alleged violation, shall include, but not necessarily be limited to:

- i. the probationer's criminal or juvenile record;
- ii. the nature of the offense for which the probationer is on probation;
- iii. the nature of the offense or offenses with which the probationer is newly charged, if any;
- iv. the nature of any other pending alleged probation violations;
- v. the likelihood of probationer's appearance at the final probation violation hearing if not held in custody; and
- vi. the likelihood of incarceration or commitment if a violation is found following the final probation violation hearing.

If no probable cause is found, a probation violation hearing may be scheduled and the

probationer thereupon served with notice thereof, but the probationer may not be held in custody nor shall an order of release be issued pending said hearing based on the alleged probation violation.

(d) Bail. Upon a finding of probable cause and an order of custody, the court shall not consider or impose any terms of release such as bail, personal recognizance or otherwise as an alternative to such custody. Notwithstanding such order of probation custody, the court shall proceed to determine the issues of bail and pretrial detention ("dangerousness") on any newly charged offense, as provided by law.

RULE 9. VIOLATION OF CONDITIONS OF A CONTINUANCE WITHOUT A FINDING

(a) Notice, Conduct of Hearing, Adjudication. The procedures set forth in these rules regarding notice for, and the conduct and adjudication of, probation violation hearings shall also apply where the Probation Department alleges a violation of probation that was imposed together with a continuance without a finding.

(b) Disposition. The dispositional options available to the court following a determination that one or more conditions of probation imposed together with a continuance without a finding have been violated shall be as follows:

(i) Continuation of the Continuance. The court may decline to modify or revoke the probation order and instead may continue the continuance without a finding and issue to the probationer such admonition or instruction as it may deem appropriate.

(ii) Termination. The court may order that the continuance without a finding be considered completed, terminate the order of probation and enter a dismissal on the underlying criminal case.

(iii) Modification. If the violation consists of a criminal or delinquent act, or if the court determines that the violation constitutes a material change in circumstance, it may continue the continuance without a finding and modify the conditions of probation including the duration of the continuance.

(iv) Revocation. The court may revoke the order of probation and terminate the continuance without a finding, whereupon a finding of guilty, delinquency or youthful offender shall be entered.

(c) Execution of Sentence or Commitment; Stay of Execution. Upon revocation of probation, any sentence or commitment to the Department of Youth Services that was specified as a condition of the plea or admission and accepted by the court that ordered the continuance,

April 18, 2006

shall be imposed and executed forthwith; provided, however, that such execution may be stayed (1) pending appeal in accordance with Mass. R. Crim. P. 31, or (2) at the court's discretion, and upon the probationer's motion, to provide a brief period of time for the probationer to attend to personal matters prior to commencement of a sentence of incarceration or commitment to the Department of Youth Services. The execution of such sentence shall not be otherwise stayed.

(d) Imposition of Sentence When No Sentence or Commitment Previously Specified.
Upon revocation of a probation order where no sentence or commitment to the Department of Youth Services was specified as a condition of the plea or admission and accepted by the court that ordered the continuance, the court shall impose sentence or commitment as provided by law.